

**Comments of  
The Juvenile Products Manufacturers Association, Inc.,  
on the Notice of Proposed Rulemaking regarding Confidential Business Information  
Docket No. NHTSA-02-12150**

**July 1, 2002**

The Juvenile Products Manufacturers Association, Inc. (“JPMA”) submits the following comments in response to NHTSA’s Notice of Proposed Rulemaking proposing amendments to 49 C.F.R. Part 512 – Confidential Business Information.

JPMA is a national trade association of more than 400 companies in the United States, Canada, and Mexico. These companies manufacture and/or import infant and juvenile products, such as cribs, car seats, bedding, and a wide range of accessories and decorative items. Of the more than 400 JPMA members, only five still manufacture automobile child restraints for sale in the United States. The automobile child restraint manufacturers are Britax, Cosco, Evenflo, Graco/Century, and Peg Perego.

JPMA members endorse the Agency’s efforts to streamline and clarify the procedures for the submission of confidential information and to update Part 512 in light of significant Freedom of Information Act (“FOIA”) case law, such as *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992), and *Center for Auto Safety v. NHTSA*, 244 F.3d 144 (D.C. Cir. 2001). The protection of confidential business and technical information is vitally important to JPMA’s members, who compete vigorously with each other. An effective, understandable, and efficient process for submitting and protecting confidential commercial and financial information also contributes to NHTSA’s ability to obtain the information that it needs to carry out its regulatory mission.

These comments address a number of issues that are important to JPMA’s members.

**A. “Early Warning” Information.** NHTSA has requested comments on how “early warning” information, submitted pursuant to the TREAD Act and regulations to be promulgated thereunder, should be treated under Part 512. JPMA and its members strongly urge the Agency to adopt a presumption of confidentiality for such information.

The TREAD Act reflects Congress’ assumption that “early warning” information will generally be treated as confidential. The Act states that “[n]one of the information collected pursuant to the [“early warning” regulation] shall be disclosed *pursuant to section 30167(b)* unless the Secretary determines the disclosure of such information will assist in carrying out sections 30117(b) and 30118 through 30121.” 49 U.S.C.A. § 30166(m)(4)(C) (emphasis added). The reference to Section 30167(b) is significant because information is not subject to disclosure under Section 30167(b) unless it *already* has been found to be otherwise entitled to confidential treatment. In addition, Sections 30117(b) and 30118 through 30121 relate to the investigation and remediation of specific safety-related defects and non-compliances; thus, Congress clearly was contemplating that information obtained by the Agency through the “early warning” reporting requirements would be disclosed only in those instances when a specific defect or

noncompliance investigation is opened. Only then would any of the information submitted under the “early warning” requirements be made publicly available, just as such information is now.

To impose a presumption of publicity for “early warning” information would render Section 30166(m)(4)(C) superfluous, contrary to “cardinal principle[s] of statutory construction.” *TRW Inc. v. Andrews*, 122 S. Ct. 441, 449 (2001) (“It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.”). It also would change settled Agency practice (under which information submitted by manufacturers during pre-investigatory screenings is not automatically released to the public), despite the fact that Congress, which must be presumed to have been aware of the Agency’s practice, did *not* seek to amend or abrogate the practice. *See U.S. v. Wilson*, 2002 U.S. App. LEXIS 8907, at \*22 (D.C. Cir. 2002) (Congress is “presumed to be aware of established practices and authoritative interpretations of coordinate branches” and, when it legislates in an established area of practice without altering it, is “presumed to preserve, not abrogate, the background understandings against which it legislates”). Thus, a presumption of non-confidentiality for “early warning” information would conflict with Congressional intent, as manifested in the TREAD Act.

In addition, such a presumption would be likely to substantially harm the competitive position of submitters of “early warning” information. *See National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (setting forth substantial competitive harm standard for protection under FOIA Exemption 4 of information submitted under legal compulsion). The “early warning” submissions will consist of comprehensive compendia of product information. Because they will provide valuable information about entire product lines, as well as aggregate costs, these compendia will be far more competitively valuable than is the information about specific products and defects that the Agency now discloses to the public.

Moreover, because much of the “early warning” information will be “raw,” in the sense that it will be derived from consumer claims and complaints that have not been analyzed or tested, it also has a great potential to mislead consumers about issues of quality and safety. This potential misuse of the information can have significant competitive consequences.

Furthermore, because of differences in the terms and conditions of warranties, and in the way information on claims, warranties, and complaints is maintained by various manufacturers, some manufacturers will be able to lawfully make much more circumscribed submissions than others. If all of the information were to be disclosed, the manufacturers making more limited submissions would obtain more information about their competitors’ products than they would be disclosing, which would give them unequal access to competitively significant information. In addition, the “early warning” information could be used by new entrants to the market to obtain valuable competitive information (at virtually no cost) that would otherwise be very expensive or impossible to obtain.

Thus, because Congress clearly presumed that “early warning” information generally would be treated as confidential, and because of the great potential for significant competitive

harm from the routine release of the “early warning” information, NHTSA should adopt a presumption of confidentiality for such information.<sup>1</sup>

**B. “Early Warning” Quarterly Production Volumes and Trend Data.** Even if there were not compelling arguments that Congress assumed that “early warning” information generally would be treated as confidential and that the release of “early warning” information generally would cause submitters substantial competitive harm, it would be clear that a presumption of non-disclosure should be applied to certain categories of information that are likely to be required in the final “Early Warning” rule. In particular, the quarterly production volumes and trend data (specifically warranty claims and consumer complaints) that are likely to be included in the final rule should be protected from disclosure under Exemption 4 of the FOIA.

Quarterly production volumes and trend data about warranty claims and consumer complaints would provide competitors and new entrants to the market with invaluable “real time,” ongoing competitive information about submitters’ respective production capacities, sales, and market performance. Such information, which would otherwise either be unobtainable or obtainable only through extremely expensive market research, would give competitors – especially new and would-be new entrants to the market – invaluable insights into the operational and market strengths and weaknesses of submitters, enabling competitors to target their production and marketing efforts to areas where they detect vulnerabilities in a submitter’s market position.

Accordingly, even if the Agency does not adopt a presumption against disclosure of “early warning” information generally, it should adopt such a presumption with respect to quarterly production volumes and trend data about warranty claims and consumer complaints, if such information were to be required in the final “Early Warning” rule.

**C. The Proposed Class Determination that the Release of Certain Information is not Competitively Harmful.** NHTSA is proposing a class determination that the release of certain categories of information generally does not cause competitive harm. Presumably, like the existing class determinations, this class determination would be used to guide the Agency’s decisions about the protection of information under Part 512 and, therefore, the information included in the new class determination would generally *not* be protected under Part 512. Although JPMa has concerns about some of the particular categories of information proposed by NHTSA in the notice – such as certain test data – JPMa’s comments will focus on a more significant conceptual problem with NHTSA’s proposal.

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<sup>1</sup> In adopting a presumption against disclosure of “early warning” information, the Agency also should expressly clarify that submitters of “early warning” information are not required to submit Part 512 confidentiality requests and certifications with each “early warning” submission. Especially in light of the fact that each submitter’s periodic “early warning” submissions will include similar or identical kinds of information, it would be unnecessarily burdensome to require submitters of early warning information to file what would likely be a duplicative Part 512 request with each such submission.

It is clear from the preamble and the language of the proposed regulation that NHTSA is premising this new class determination solely on the alleged lack of *competitive* value of the specified categories of information. Although such a premise would be germane to establishing a presumption about the confidentiality of information submitted under *compulsion* (the confidentiality of which would be subject to the *National Parks* substantial competitive harm test), a determination that the release of information would not be competitively harmful is irrelevant when the information has been submitted *voluntarily* (and, therefore, is subject to the categorical rule of *Critical Mass* and *Center for Auto Safety*). For *voluntarily*-submitted information, the Exemption 4/Part 512 confidentiality issue is determined by whether the information is of a kind that the submitter does not customarily disclose to the general public. *Center for Auto Safety*, 244 F.3d at 147; *Critical Mass*, 975 F.2d at 879.

Thus, for information that has been submitted voluntarily, a determination that its release generally would not substantially harm the submitter's competitive position does not provide a basis for the Agency to disclose the information. Because, however, the proposed class determination addresses *only* the competitive harm ensuing from the disclosure of certain categories of information, and does not apply the appropriate test for voluntarily-submitted information, the class determination does not support a blanket presumption of non-confidentiality with respect to information in those categories.

Accordingly, JPMA recommends that, if the Agency adopts this new class determination that the release of certain categories of information is not competitively harmful, NHTSA should also expressly state in the rule that this class determination has *no* bearing on the eligibility of voluntarily-submitted information for protection under FOIA Exemption 4 and Part 512.

**D. Copies of Submissions.** Contrary to the Agency's clear intent, the proposed rule significantly complicates the submission process under Part 512. Under the current practice, the submitter of confidential information submits two copies of the complete submission (which includes *all* of the submitted information, both confidential and non-confidential) and one redacted copy of the submission (for placement in the public docket). Under the Agency's proposed rule, submitters would be required to prepare *three* different versions of their submissions: (1) a complete version (including both confidential and non-confidential information); (2) a redacted version; and (3) a version for the Office of Chief Counsel that contains only confidential information and such non-confidential information as is necessary for evaluating the submitter's confidentiality claims.

The preparation of *three* separate versions of each submission would significantly increase the time, expense, and difficulty associated with the exercise of the statutory right to protection of confidential commercial and financial information. In addition, as proposed, the rule would put submitters in the untenable position of having to predict which non-confidential information the Office of Chief Counsel will need to assess the submitter's request for confidential treatment.

JPMA believes that the better course would be to continue with the present practice of requiring submitters to prepare only two versions of their submissions. A practical approach would require that submitters furnish the Agency with two copies of the complete submission (which would contain *all* of the information being submitted, including both the confidential and

non-confidential information, with the confidential material clearly marked), as well as one or two redacted copies.<sup>2</sup> The submission of a complete copy, with the confidential material clearly marked (as required by both the existing and proposed regulations) would provide the Office of Chief Counsel with all the information it needs to evaluate the confidentiality requests, while not unduly burdening submitters with the requirement to prepare *three* different versions of their submissions – one of which would be based on the submitters’ prognostications about the information that the Office of Chief Counsel will need to assess the confidentiality claims.

**E. Formatting Issues.** JPMA applauds the Agency’s use of plain English in the proposed regulation, and generally finds the organization of the proposed regulation to be clear and helpful. JPMA suggests, however, that the regulation would be clearer and easier to follow if the Agency were to consolidate into a single section the sections now titled “How many copies should I submit?” and “Where should I send the information for which I am requesting confidential treatment?”.

As drafted, these two sections are confusing and not entirely consistent with each other. For instance, although the proposed section on the number of copies refers to sending a redacted copy to the public docket, the section on where to send the information fails to mention this. As noted above, the Agency’s proposed approach to the submission of different versions of the submissions should be revised to provide for the submission of only two, not three, versions, and it may be advisable for the Agency simply to require the submission of two copies each of the complete submission and the redacted submission. If this approach is taken, the sections on the number of copies and where to send them could be consolidated into a single easy-to-follow section that tells submitters to send (1) one complete copy (with confidential material clearly marked by means of brackets and/or “Entire Page Confidential” notations) to the Office of the Chief Counsel; (2) the other complete copy (with the same confidential markings) and a redacted copy to the NHTSA office requesting the information or to whom the information is directed; and (3) the other redacted copy to the public docket (if a docket has been established) or to the same requesting NHTSA office designated in (2).

**F. Privacy Act Redactions.** The proposed rule would have submitters take over the responsibility of redacting identifying private information from submitted documents. Although it is JPMA’s understanding that some submitters gratuitously undertake this task already – in

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<sup>2</sup> Although it would increase the expense of submissions to require, as a matter of course, that submitters provide the Agency with *two* redacted copies of their submissions, such a requirement might actually simplify matters for both submitters and the Agency, if the Agency concludes that it generally will need one redacted copy for the public docket and another redacted copy for NHTSA personnel who will be working with the information and may need ready access to a redacted copy in order to prepare public analyses and reports. As currently proposed, the revised Part 512 would require submitters to submit one redacted copy when there is no pre-established public docket for the information and two when there is. As detailed below, it might be simpler for submitters (and the Agency’s internal processes) if there were just a blanket requirement to submit two redacted and two complete submissions. If this approach were adopted, the Agency could also adopt a liberal policy of exempting submitters from the requirement to submit two redacted copies when the submissions would be quite voluminous.

order to protect their customers' private information – JPMA opposes making this a requirement. JPMA understands that the redaction of private identifying information can be an onerous task, but JPMA is unaware of any basis under the Privacy Act for NHTSA to delegate to private submitters its responsibility to protect private information. Moreover, there is no basis for imposing what, in effect, would be a tax on the right of private submitters to obtain confidential treatment of confidential commercial or financial information (by requiring them to perform this task at their expense). Finally, if, as we believe, the Agency's duties under the Privacy Act are not delegable, the Agency would have to meticulously check any redactions performed by a private submitter. Thus, the additional costs to submitters imposed by this requirement would not be compensated by any savings to the Agency.

**G. The Duty to Update Prior Submissions.** The Agency has proposed that a submitter be required to amend its justifications and certifications if the submitter knows or becomes aware of any change in the status of the information submitted in support of a claim for confidential treatment. This constitutes a sharp departure from the existing regulation, which requires an amendment only when the failure to provide one "is in substance a knowing concealment." 49 C.F.R. § 512.4(i) (2001). This new requirement would impose significant new uncertainties on submitters (about, for instance, when new information that *might be marginally* relevant requires an amendment to a previous submission). The same complexities would make the requirement difficult for the Agency to police and administer. Accordingly, JPMA opposes this proposed change to Part 512.

**H. Duration of Confidentiality Request.** The proposed rule appears to have omitted a requirement that requesters specify and justify a duration for their confidentiality request in their supporting information. Such a requirement now appears in Part 512.4(b)(3)(ix).

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JPMA appreciates this opportunity to provide comments to the Agency. If there is any additional information that JPMA or its members can provide to assist the Agency in developing this rule, please contact us.